

**Internal Revenue Service**

**Department of the Treasury**

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Person To Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-137309-10

Date:

March 10, 2011

Re:

**LEGEND:**

Donor 1	=
Donor 2	=
Trust	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Child A	=
Child B	=
Child C	=
<u>A</u>	=

Dear :

This letter responds to the submission dated September 1, 2010, and subsequent correspondence, requesting an extension of time pursuant to § 2642(g) of the Internal Revenue Code and § 301.9100-3 of the Procedure and Administration Regulations to elect out of the generation-skipping transfer (GST) tax exemption automatic allocation rules.

Donor 1 and Donor 2 are spouses. On Date 1, prior to December 31, 2000, Donor 1 and Donor 2 created Trust, an irrevocable trust. Under Article First of Trust, until both Donor 1 and Donor 2 have died, one-third of the trust property is to be held for Child A, another third is to be held for Child B, and the last third is to be held for Child C. Each child's share has substantially identical terms. Income is to be paid to the child in annual or more frequent installments. On the first anniversary of the death of the survivor of Donor 1 and Donor 2, one-fourth of a child's share will be paid to that child. On the third anniversary of the death of the survivor of Donor 1 and Donor 2, one-third of a child's share will be paid to that child. On the fifth anniversary of the death of the survivor of

Donor 1 and Donor 2, one-half of a child's share will be paid to that child. On the seventh anniversary of the death of the survivor of Donor 1 and Donor 2, the remaining balance of a child's share is to be paid to that child.

If a child dies before his share is fully paid to him, and a sibling of the child is living, the net income of the child's share is to be paid to the child's children. Portions of the principal are to be paid to the grandchild upon the grandchild's attaining certain ages. If a child dies before his share is fully paid to him, and no sibling of the child is living, the child's share is to be paid to the child's living descendants, in equal shares.

Under Article Sixteenth of Trust, with respect to any inter vivos transfer made by Donors 1 and 2 during any calendar year, each of the persons living on the date such transfer is made who is a person (i) to whom income of the trust may be currently distributed, or (ii) who is a presumptive taker of the next succeeding income interest or the remainder interest, is authorized, no later than thirty days after the giving of notice, to withdraw certain amounts.

Trust was drafted by A, who did not inform Donors 1 and 2 of the application of the deemed allocation rules of § 2632(c) to transfers made after December 31, 2000. Donor 1 and Donor 2 made transfers to Trust on Date 2, Date 3, Date 4, Date 5, Date 6 and Date 7 (all after December 31, 2000). On the gift tax returns filed for the transfers, Donor 1 and Donor 2 treated the gifts as made one-half by each under § 2513.<sup>1</sup>

Recently, Donor 1 and Donor 2 learned that under the deemed allocation rules of § 2632(c), GST exemption was allocated to their transfers to Trust after December 31, 2000, and that to avoid the allocation of GST exemption to a GST trust, a taxpayer must affirmatively elect out. Donor 1 and Donor 2 now seek a ruling granting an extension of time to elect out of the automatic allocation rules with respect to the Date 2 through Date 7 transfers to Trust.

Section 2601 imposes a tax on every generation-skipping transfer. A generation-skipping transfer is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2602 provides that the amount of the tax imposed by § 2601 is the taxable amount multiplied by the applicable rate. Section 2641(a) defines the applicable rate as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer. Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is the excess (if any) of 1 over the applicable fraction. The applicable fraction, as defined in § 2642(a)(2), is a fraction, the

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<sup>1</sup> Under § 2513(a)(1), if both spouses have signified their consent, a gift made by one spouse to any person other than his spouse shall be considered as made one-half by him and one-half by his spouse.

numerator of which is the amount of the GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust or involved in the direct skip.

Section 2631(a), as effective in the year at issue, provided that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(c)(1) provides that if any individual makes an indirect skip during such individual's lifetime, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. If the amount of the indirect skip exceeds such unused portion, the entire unused portion shall be allocated to the property transferred.

Section 2632(c)(3)(A) provides that, the term "indirect skip" means any transfer of property (other than a direct skip) subject to the tax imposed by chapter 12 made to a GST trust, as defined in § 2632(c)(3)(B). Under § 2632(c)(5)(A)(i)(I) and (II), an individual may elect to have the automatic allocation rule in § 2632(c)(1) not apply to an indirect skip, or to any or all transfers made by such individual to a particular trust.

Section 2632(c)(5)(B)(ii) provides that an election under § 2632(c)(5)(A)(i)(II) may be made on a timely filed gift tax return for the calendar year for which the election is to become effective.

Section 26.2632-1(b)(2)(iii) of the Generation-Skipping Transfer Tax Regulations provides, in relevant part, that, to elect out, the transferor must attach a statement (election out statement) to a Form 709 filed within the time period provided in § 26.2632-1(b)(2)(iii)(C) (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). The election out statement must identify the trust (except for an election out under § 26.2632-1(b)(2)(iii)(A)(4)) and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Further, unless the election out is made for all transfers made to the trust in the current year, the current-year transfers to which the election out is to apply must be specifically described or otherwise identified in the election out statement.

Section 26.2632-1(b)(2)(iii)(C) provides, in relevant part, that to elect out, the Form 709 with the attached election out statement must be filed on or before the due date for timely filing (within the meaning of § 26.2632-1(b)(1)(ii)) of the Form 709 for the calendar year in which the first transfer to be covered by the election out was made.

Section 2642(g)(1)(A) provides, generally, that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1) or (2), and an election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this paragraph.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under § 2642(g)(1), the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Section 2652(a)(2) provides, in relevant part, that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by the spouse of such individual, such gift shall be so treated for GST tax purposes.

Notice 2001-50, 2001-2 C.B. 189, provides that, under § 2642(g)(1)(B), the time for allocating the GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a generation-skipping transfer trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-1(a).

Section 301.9100-2 provides an automatic extension of time for making certain elections. Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose date is prescribed by a regulation (and not expressly provided by statute). In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Section 301.9100-3(a) provides, in part, that requests for relief subject to § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, except as provided in § 301.9100-3(b)(3)(i) through (iii), that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, Donor 1 and Donor 2 are granted an extension of time of 120 days from the date of this letter to make an election under § 2632(c)(5)(A)(i)(II) that the automatic allocation rules do not apply to the transfers to Trust after December 31, 2000. The election out will be effective as of the dates the respective returns were filed. The elections should be made on Forms 709, and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each Form 709. Two copies are enclosed for that purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Leslie H. Finlow  
Senior Technician Reviewer, Branch 4  
Office of Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures  
Copy for § 6110 purposes